STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFRED AARON MCGLOTHIN,

Defendant-Appellant.

UNPUBLISHED
January 20, 2005

No. 250611
Muskegon Circuit Court
LC No. 02-047860-FH

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for possession with the intent to deliver 50 grams or more but less than 225 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(iii), carrying a concealed weapon, MCL 750.227, and possession of a firearm when committing or attempting to commit a felony, MCL 750.227b. We affirm.

I. Facts

Based on tips describing defendant as a cocaine dealer, the police placed defendant under surveillance. An officer assigned to the surveillance saw defendant entering and leaving the house identified as defendant's residence and observed defendant's car parked in front of the same residence. As part of their surveillance, police officers had run a LEIN check on defendant and discovered that he did not possess a valid Michigan driver's license. Defendant then left the house and drove off in the car. Based on the information obtained during the LEIN check, defendant was stopped and later arrested for failing to have a valid driver's license. Defendant was patted down by one of the arresting officers, who found a handgun in defendant's front pocket and more than 100 grams of rock cocaine in his back pocket.

After defendant's arrest, several officers entered the residence which defendant had recently left to secure it while awaiting a search warrant. After entering the house, the officers saw some cocaine and a razor blade on a table. After the officers obtained a search warrant, they conducted a thorough search and found more rock cocaine, some cash, a digital scale and some measuring cups with cocaine residue.

In the meantime, defendant had been brought back to the local police station where he was read his rights, which he waived. During questioning, defendant admitted that the cocaine found on him was his and stated that he had been selling cocaine for the past few months.

Defendant also implicated Carlos Bankhead and Erica Barnes as his suppliers. During the course of the same evening that defendant was arrested, he cooperated with police by showing them several residences where his suppliers lived or stored their cocaine, by arranging a drug buy from one of the suppliers, wearing a recording device while locked in a cell with the supplier, and by agreeing to testify against both implicated suppliers. The next day, police officers again interrogated defendant, but they did not read him his rights again. Defendant again admitted to selling drugs and discussed drug dealings with his suppliers. Shortly thereafter, defendant ceased cooperating with the police and was charged with the crimes for which he was convicted.

II. Claims of Ineffective Assistance of Counsel

Defendant raises several claims of ineffective assistance of counsel. The effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome this burden, a defendant must first show that his counsel's performance was below an objective standard of reasonableness under the circumstances and according to prevailing professional norms and then must show that there is a reasonable probability that but for counsel's errors, the trial outcome would have been different. *Id.* at 663-664. In addition, where, as in this case, no separate evidentiary hearing was held below and defendant's motion to remand was denied, this Court is limited to a review of mistakes apparent from the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

A. The Search Incident to Arrest

Defendant first contends that his counsel was ineffective because he failed to move to suppress the items seized during the search incident to his arrest and those objects seized during the search of his residence.

Our Supreme Court has specifically incorporated the warrant exception for searches incident to an arrest. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996) ("A search of a person incident to an arrest requires no additional justification."). The Court further stated that an arrest based upon probable cause is not an unreasonable intrusion under the Fourth Amendment. *Id.* Furthermore, probable cause exists where "the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id.*

Because the officers were aware that defendant did not have a valid Michigan driver's license, when defendant drove away from his residence they knew that he was committing a crime and therefore had probable cause to arrest him. The fact that they may also have been motivated by the hope that they would find evidence of another crime is irrelevant. See *People v Haney*, 192 Mich App 207; 480 NW2d 322 (1991). The proper test is objective and does not look to the subjective hopes of the officers, but rather looks to whether the police had probable cause and whether they were authorized to effect a custodial arrest for the crime for which the probable cause existed. *Id.* at 210. Because the officers were authorized to effect a custodial arrest for driving without a license, *id.* at 210-211, the search incident to defendant's arrest was lawful, *Champion, supra* at 115. Consequently, a motion to suppress the fruits of this search

would have been futile and defense counsel is not ineffective for failing to make a futile motion. *Riley, supra* at 142.

B. The Search of the Home

Another exception to the general warrant requirement is in the case of exigent circumstance. See *People v Cartwright*, 454 Mich 550, 559; 563 NW2d 208 (1997). In *Cartwright*, our Supreme Court stated that:

> 'Pursuant to the exigent circumstances exception, we hold that the police may enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect. If the police discover evidence of a crime following the entry without a warrant, that evidence may be admissible.' [*Id.* at 559, quoting *In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993).]

In the present case, an officer observed defendant entering and leaving the residence and shortly after leaving, defendant was arrested with a substantial amount of cocaine on his person. That provided the officers with probable cause to believe that defendant had used the residence to prepare the cocaine. Based on this belief, the officers were ordered to secure the residence while a search warrant was obtained. The officers entered the residence, conducted a brief search to ensure that no one was there and then awaited the search warrant. The police did not conduct a thorough search until after the warrant had been issued.

Under the doctrine of exigent circumstances, officers who have probable cause to believe that a crime has been committed in a residence may enter the residence to conduct a quick protective search. See *id.* at 559-562; see also *People v Snider*, 239 Mich App 393, 410; 608 NW2d 502 (2000) (stating that an officer may enter a residence in which he had probable cause to believe a crime had been committed to prevent the destruction of evidence, protect police or others, to prevent escape, or to check for persons in need of help). In this case, the officers had reason to believe that defendant was engaged in drug trafficking, and the seizure of a weapon on his person gave officers sufficient legal reason to conduct a sweep of the house to ensure their own protection. Thus, the officers' initial search of the residence was lawful and a motion to suppress the fruits of that search would have been futile.

In addition, defendant does not contest the validity of the warrant issued for the subsequent more extensive search of the home. Because this Court may only review claims of ineffective assistance of counsel based on the record, this Court must assume that the subsequent warrant was valid. *Riley, supra* at 139. As such, it would have been futile to attempt to suppress this search. Because none of the searches were unlawful, defendant's counsel cannot be faulted for not attempting to suppress them. *Snider, supra* at 425 ("Trial counsel is not required to advocate a meritless position.").

C. Defendant's Statements

Defendant next contends that his second statement to the police was coerced by promises of leniency in violation of his rights and, therefore, his counsel should have moved to suppress them.

A statement made by an accused during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). *Miranda* warnings are required whenever a person is interrogated by police while in custody. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). *Miranda* rights need not be read every time an interrogation occurs, but rather the only question is whether under the totality of the circumstances the statement was voluntary. *People v Godboldo*, 158 Mich App 603, 606; 405 NW2d 114 (1986). A statement, which is voluntarily made under the totality of the circumstances, is admissible. *Id.* at 120-121.

The second interview of defendant occurred on the day after he was arrested. Since the time of his arrest, defendant had been talking and cooperating with police. Defendant had shown police the addresses where Bankhead and Barnes conducted drug activity, contacted Bankhead to attempt to establish a drug deal, and wore a listening device while in the same cell as Bankhead. Therefore, at the time of the second interview, the police had every reason to believe that defendant was knowingly cooperating with them and voluntarily providing them with more information. Furthermore, defendant provided no evidence that this statement was the result of any promises made by the police. The fact that he was not provided with a new *Miranda* warning only relates to the totality of the circumstances. *People v Littlejohn*, 197 Mich App 220, 223; 495 NW2d 171 (1992). When examining the totality of the circumstances, defendant was cooperating with police officers in an attempt to secure for himself a favorable outcome to the criminal charges he faced. Nothing in the record indicated that there were any actions on the part of any law enforcement personnel that would cause defendant to believe he could not voluntarily cease cooperating with the police officers. Thus, defendant's second statement to the police was voluntary. Therefore, this statement was admissible and a motion to suppress would have been futile. In addition, defendant's trial counsel did object to the presentation of testimony regarding this second interview, and the trial court overruled the objection on the grounds that given the cooperation of defendant, the police did not need to renew the *Miranda* warnings. Therefore, defendant's contention that defense counsel was ineffective because he failed to move for the suppression of the second interview before trial is without merit.

D. Defendant's Cooperation Agreement and Entrapment Defense

Defendant next contends that his trial counsel was ineffective for failing to move to enforce his cooperation agreement.

Defendant has failed to provide any evidence of an enforceable cooperation agreement. Rather he asserts that his cooperation could not otherwise be reasonably explained. There is uncontroverted testimony by the lead detective that there was no cooperation agreement with defendant. Because this Court must base this review for ineffective assistance of counsel on the record, *Riley*, *supra* at 139, and the record does not reveal any evidence of a cooperation

agreement, it cannot be said that counsel was ineffective for failing to attempt to enforce a nonexistent cooperation agreement.

Defendant also contends that his trial counsel was ineffective for failing to present an entrapment defense. In Michigan, a defendant is considered entrapped if "either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002). Where law enforcement officers "present nothing more than an opportunity to commit the crime, entrapment does not exist." *Id.*

In the instant case, defendant asserts that he was entrapped by the police when they received tips that he was a drug dealer and then "set up a sting to trap him by contacting him directly or by having an informant set up a buy." This statement is unsupported by the trial record. The only evidence presented in support of this contention is defendant's own affidavit submitted with his second motion to remand. But even if we accept that defendant was induced by a police informer to deliver cocaine to the liquor store where defendant was arrested, this alone would not establish entrapment, because the police merely presented defendant with the opportunity to commit the crime. Because defendant's counsel need not present a futile defense, see *Snider*, *supra* at 425, this is not an instance where defense counsel was ineffective.

III. Drug Profile Evidence

Defendant next contends that he is entitled to a new trial because the trial court erroneously permitted drug profile testimony without a jury instruction.

Because admission of the expert's testimony was not objected to, this issue is not preserved and our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Likewise, the failure to request a jury instruction precludes a defendant from seeking relief in the appellate courts. *People v Gonzalez*, 468 Mich 636, 642; 664 NW2d 159 (2003). The forfeited nonconstitutional error may not be considered unless the error was plain and it affected defendant's substantial rights. *Id.* at 643.

Defendant correctly notes that the use of drug profile evidence as substantive evidence of guilt is not permitted. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Drug profile evidence is an informal compilation of characteristics often displayed by those trafficking in drugs. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). This evidence is inherently prejudicial because it may suggest to the jury that otherwise innocuous behavior indicates criminal activity. *Id.* at 53. However, courts are permitted to use expert testimony, even expert police testimony, to explain the significance of items seized and aid the jury's understanding in controlled substance cases. *Id.* Before this type of testimony is admissible, "(1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline." *Id.*

In the present case, the prosecution qualified its expert on drug trafficking and the trial court designated him as such without objection. The expert then testified concerning the forms that cocaine can be found in, the way that powdered cocaine is cooked to form crack cocaine, the

cost of various amounts and types of cocaine, how cocaine is packaged and sold, and the way in which firearms and safe houses are employed by drug dealers. Without this testimony, the prosecution argues, it would be difficult for a layperson to understand the significance attributable to the presence of more than 100 grams of rock cocaine found on defendant. We agree. Likewise, the jury would not have fully understood testimony regarding the cooking of powdered cocaine or the values attributable to the cocaine described. In addition, narcotics trafficking is a recognized area of expertise. *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993). Hence, the testimony passed the three-part expert admissibility test.

However, the mere admissibility of the expert's testimony does not end the analysis. The expert's testimony may still not be offered as substantive evidence of guilt, but rather must be solely directed at improving the jury's understanding of the evidence presented. *Murray*, *supra* at 58-59. The *Murray* Court identified a series of factors, which may be helpful "in distinguishing between the appropriate and inappropriate use of drug profile evidence and thus help to determine the admissibility of such evidence." *Id.* at 56-57. These included: the reason given and accepted for the admission of the profile testimony, whether the profile, without more, could enable a jury to infer the defendant's guilt, whether the court made it clear how the evidence was to be used, e.g., through a jury instruction, and whether the expert witness expressed his opinion, based on a profile, that the defendant was guilty, or expressly compared the defendant's characteristics to the profile in such a way that guilt was necessarily implied. *Id.* When the expert testimony in this case is analyzed according to these factors, it is clear that the testimony was not improper.

While the prosecutor never stated the reason that the narcotics tracking expert testimony was offered, it is clear from the nature of the testimony that it was offered for a permissible purpose. The expert testified to the types of cocaine and how and why rock cocaine is made, the weight, appearance, and packaging of a typical rock of crack cocaine, the typical appearance and packaging of powder cocaine, how cocaine is used, the typical amounts of cocaine purchased by users as opposed to dealers, the instruments used to process powdered cocaine into saleable rocks, the value of rock cocaine when divided for sale, the use of weapons for protection, and the use of safe houses to store cocaine. All of this testimony served to aid the jury in understanding the meaning behind various pieces of evidence presented.

In addition, the testimony presented could not by itself be used to infer guilt. The prosecution used the expert testimony to show that the presence of more than 100 grams of rock cocaine on defendant demonstrates intent to sell the cocaine. The prosecution also referenced the expert testimony to explain the importance of the digital scale and other evidence of drug production, as well as the potential value of the various amounts of cocaine found. But the fact remains that the prosecution did not rely on expert testimony as substantive proof of guilt. The expert's testimony was meaningless without the physical evidence presented by the prosecution. Defendant was found in possession of more than 100 grams of rock cocaine and a concealed firearm. The residence had even more rock cocaine, a digital scale and rock cocaine preparation materials with cocaine residue on them. These are not innocuous pieces of evidence that are being impermissibly equated with criminal activity by drug profile testimony, but rather are substantive proof of guilt. In addition, the prosecution presented evidence that defendant admitted to being a seller of cocaine. This Court has said that an expert who testified that the

"quantity of crack cocaine found in defendant's possession, the fact that the rocks of crack cocaine were evenly cut, and the selling price of crack cocaine on the street clearly indicated that defendant intended to sell the drugs," was permissible testimony. *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991). Therefore, the pieces of the profile by themselves do not "establish the link between innocuous evidence and guilt." *Murray, supra* at 57.

Finally, at no point did the expert witness testify as to his opinion based upon the profile and he did not compare defendant's characteristics to that of the profile. Instead, the jury was left to accept or reject the possible inferences to be made from the amount of cocaine found on defendant and the other evidence. Given the nature of the expert testimony, the use to which the prosecution put the testimony, and the other evidence presented at trial, the expert testimony was not impermissible drug profile testimony.

IV. Disproportionate Sentence

Defendant did not object to his sentence at the trial court level and consequently the issue was not preserved. An unpreserved claim of cruel and unusual punishment based upon proportionality is reviewed for plain error. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

Defendant was sentenced to 15 to 50 years for the conviction of possession with the intent to deliver 50 grams or more but less than 225 grams of cocaine as a habitual felon, fourth-felony offense. This sentence was within the sentencing guidelines and the decision to sentence consecutively was within the discretion of the court. MCL 333.7401(3) (before the enactment of 2001 PA 236, § 3 required consecutive sentences; after § 3 was amended by this act, it became discretionary). When the trial court's sentence is within the appropriate guidelines range, "the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence." *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). The standard of proportionality does not come into play unless the sentence departs from the sentencing guidelines. *Id.* at 262. For this reason, defendant's sentence did not constitute plain error.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello